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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Petitioner,

v.

ROBERT CASEY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. ONLY THE ALLOWANCE OF EXPERT FEES WILL GUARANTEE THE FULLY COMPENSATORY FEE REQUIRED BY SECTION 1988 6

II. CONGRESS ENACTED THE FEE PROVISION OF SECTION 1988 IN ORDER TO OVERTURN *ALYESKA* AND INCORPORATE EXISTING CASE LAW UNDER WHICH EXPERT FEES HAD BEEN GRANTED 12

III. *CRAWFORD FITTING* IS INAPPLICABLE TO THIS CASE 15

CONCLUSION 17

TABLE OF AUTHORITIES

CASES Page(s)

Ake v. *Oklahoma*, 470 U.S. 68 (1985) 7

Albemarle Paper Co. v. *Moody*,
422 U.S. 405 (1975) 8

Alyeska Pipeline Service Co. v.
Wilderness Society, 421 U.S. 240 (1975) 5, 12, 13, 15

Bebchick v. *Public Utils. Comm'n*, 318 F.2d 187
(D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963) 13

Blanchard v. *Bergeron*, 109 S. Ct. 939 (1989) 9, 11

Blum v. *Stenson*, 465 U.S. 886 (1984) 15

Bradley v. *School Bd.*, 53 F.R.D. 28
(E.D. Va. 1971), *rev'd*, 472 F.2d 318
(4th Cir. 1972), *vacated*, 416 U.S. 696 (1974) 13

Brown v. *Board of Educ.*, 347 U.S. 483 (1954) 8, 9

Cannon v. *University of Chicago*,
441 U.S. 677 (1979) 14

Carey v. *Piphus*, 435 U.S. 247 (1978) 8

Church of the Holy Trinity v. *United States*,
143 U.S. 457 (1892) 12

Cobbs v. *Grenada County*, No. WC84-136-S-O
(N.D. Miss. Sept. 13, 1989) 8

Connor v. *Winter*, 519 F. Supp. 1337
(S.D. Miss. 1981) 3

Copeland v. *School Bd.*, 464 F.2d 932 (4th Cir. 1972) 13

Page(s)

Craig v. *Boren*, 429 U.S. 190 (1976) 8

Crawford Fitting Co. v.
J.T. Gibbons, Inc., 482 U.S. 437 (1987) 5, 15, 16

Davis v. *County of Los Angeles*,
8 E.P.D. (CCH) ¶ 9444 (C.D. Cal. 1974) 14, 15

Denny v. *Westfield State College*,
880 F.2d 1465 (1st Cir. 1989) 16

Estelle v. *Gamble*, 429 U.S. 97 (1976) 8

Fairley v. *Patterson*, 493 F.2d 598 (5th Cir. 1974) 13

Friedrich v. *City of Chicago*, 888 F.2d 511
(7th Cir. 1989), *petition for cert. filed*,
58 U.S.L.W. 3505 (U.S. Jan. 29, 1990)
(No. 89-1230) 2, 6, 7, 14, 16

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 8

Hanrahan v. *Hampton*, 446 U.S. 754 (1980) 14

Hensley v. *Eckerhart*, 461 U.S. 424 (1983) 6, 11, 13, 15

Hughes v. *Rowe*, 449 U.S. 5 (1980) 14

Independent Federation of Flight Attendants
v. *Zipes*, 109 S. Ct. 2732 (1989) 12

Jones v. *Wittenberg*, 330 F. Supp. 707
(N.D. Ohio 1971), *aff'd*, 456 F.2d 854
(6th Cir. 1972) 13

Jordan v. *Allain*, 619 F. Supp. 98
(N.D. Miss. 1985) 3

La Raza Unida v. *Volpe*, 57 F.R.D. 94
(N.D. Cal. 1972) 13

Page(s)

Major v. *Treen*, 700 F. Supp. 1422 (E.D. La. 1988) 4, 8

Martin v. *Mabus*, Nos. J84-0708(B) and J85-0960(B) (S.D. Miss. Feb. 27, 1990) 3, 9

Missouri v. *Jenkins*, 109 S. Ct. 2463 (1989) 4, 6, 10, 16

Newman v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) 12

O'Connor v. *Donaldson*, 422 U.S. 563 (1975) 8

Pennsylvania v. *Delaware Valley Citizens' Council*, 483 U.S. 711 (1987) 11

Ramos v. *Lamm*, 713 F.2d 546 (10th Cir. 1983) 8

Rios v. *Enterprise Ass'n Steamfitters Local 638*, 400 F. Supp. 993 (S.D.N.Y. 1975), *aff'd*, 542 F.2d 579 (2d Cir. 1976) 14

Sabala v. *Western Gillette, Inc.*, 371 F. Supp. 385 (S.D. Tex. 1974), *remanded in relevant part*, 516 F.2d 1251 (5th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977) 13

Sims v. *Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972) 13

Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975) 14, 15

Tennessee v. *Garner*, 471 U.S. 1 (1985) 8

Thornberry v. *Delta Air Lines, Inc.*, 676 F.2d 1240 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952 (1983) 8

Page(s)

Thornburg v. *Gingles*, 478 U.S. 30 (1986) 7, 9

United States v. *Nobles*, 422 U.S. 225 (1975) 7

Wallace v. *House*, 377 F. Supp. 1192 (W.D. La. 1974), *vacated in relevant part*, 515 F.2d 619 (5th Cir. 1975), *vacated*, 425 U.S. 947 (1976) 13

Welsch v. *Likins*, 68 F.R.D. 589 (D. Minn.), *aff'd*, 525 F.2d 987 (8th Cir. 1975) 13

West Virginia University Hospitals, Inc. v. *Casey*, 885 F.2d 11 (3d Cir. 1989) 16

Wolf v. *Frank*, 477 F.2d 467 (5th Cir.), *cert. denied*, 414 U.S. 975 (1973) 13

Wright v. *McMann*, Nos. 66-CV-77, 67-CV-174 (N.D.N.Y. Aug. 19, 1970), *aff'd in part*, *rev'd in part on other grounds*, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972) 13

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Const. Amend. VIII 8

20 U.S.C. § 1617 (Supp. IV 1974) 14

Title IX of Public Law 92-318, 20 U.S.C. § 1681 et seq. 6

28 U.S.C. § 1821 ..... 15, 16

28 U.S.C. § 1920 ..... 15, 16

Voting Rights Act § 402, 42 U.S.C. § 1973*l*(e) 3, 14

42 U.S.C. § 1981 ..... 6, 15

Page(s)

42 U.S.C. § 1982 6

42 U.S.C. § 1983 6

42 U.S.C. § 1985 6

42 U.S.C. § 1986 6

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ..... *passim*

Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) 3, 14

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. 6

Title VII of the Civil Rights Act of 1964 § 706(k), 42 U.S.C. § 2000e-5(k) 3, 12, 14

Title VII of the Civil Rights Act of 1964 ..... 8, 14, 15

Fed. R. Civ. P. 54(d) 5, 15, 16

MISCELLANEOUS

Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) 10

122 Cong. Rec. H12,154 (daily ed. Oct. 1, 1976) 13

122 Cong. Rec. H12,155 (daily ed. Oct. 1, 1976) 13

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122 Cong. Rec. S16,252 (daily ed. Sept. 21, 1976) 13

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The Effect of Legal Fees on the Adequacy of Representation: Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. (1973) 10

H.R. 15460 (1976) 11

H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) 9, 10, 11, 14

Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorneys Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719 (1988) 9

S. 2278 (1975) 14

S. Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908 ..... 9, 11, 14, 15

Using Experts in Civil Cases (M. Kraft 2d ed. 1982) 7

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INTEREST OF *AMICI CURIAE* 1/

The question presented by this case — whether fees paid to experts are included within the attorney's fee recoverable under 42 U.S.C. § 1988 — is of vital importance to each of the *amici*.

1/ The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

The Lawyers' Committee for Civil Rights Under Law is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar throughout the country in a national effort to insure civil rights to all Americans. The Committee has, over the past 27 years, maintained a full-time staff and enlisted the services of thousands of members of the private bar in order to address the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice and law enforcement.

The American Civil Liberties Union (the "ACLU") is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the principles of liberty and equality enshrined in our Constitution and civil rights laws. In furtherance of those principles, the ACLU is involved in thousands of civil rights and civil liberties cases across the country. Some of these cases are handled by staff counsel; others by volunteer lawyers.

The ACLU of Illinois is a statewide affiliate of the national organization with its own active docket. Its lawyers represent plaintiffs in *Friedrich* v. *City of Chicago*, 888 F.2d 511 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3505 (U.S. Jan. 29, 1990) (No. 89-1230), another case raising the issue of expert fee awards under 42 U.S.C. § 1988.

The Mexican American Legal Defense and Educational Fund is a national civil rights organization founded in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics in the United States.

The Puerto Rican Legal Defense and Education Fund, Inc. was founded in 1972. It seeks to insure the equal protection of the laws and to protect the civil rights of Puerto Ricans and other Latino Americans.

These organizations, and the lawyers who work with them, employ and typically bear the cost of experts needed for the effective presentation of civil rights cases. Moreover, the impact of this case is even

broader than first appears, because the decision by the Court in this litigation may affect the interpretation of other, similarly-worded civil rights fee-shifting provisions — including those in Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k); and the Voting Rights Act, 42 U.S.C. § 1973*l*(e).

The full-time legal staffs of these organizations, as well as many of the firms volunteering their efforts on their behalf, often incur thousands or tens of thousands of dollars of expenses employing experts — including statisticians, demographers, sociologists, physicians, psychiatrists, economists, testing specialists, and others — in order to identify and combat discrimination and violations of constitutional and statutory rights. These experts help the lawyers collect the pertinent facts, shape the theories underlying the claims and formulate trial strategy. If necessary or appropriate, these experts also help the lawyers present the facts in a meaningful way by testifying at trial. In sum, experts are an integral and often necessary part of most civil rights litigation teams.

The clients represented by *amici* and private lawyers assisting them are generally indigent or of modest means and, therefore, can no more afford to pay the cost of experts than any of the other costs of litigation. Hence, expert fees are frequently an out-of-pocket expenditure of these attorneys.

The strain on the funds of these organizations due to the costs of experts is substantial. For example, the Lawyers' Committee alone has spent hundreds of thousands of dollars in expert fees in pending cases. *See, e.g., Martin* v. *Mabus*, Nos. J84-0708(B) and J85-0960(B) (S.D. Miss. Feb. 27, 1990) (denying $78,395.57 in expert fees). Expert fees generally equal 15-20% of the total amount of attorneys' fees awarded in successful Committee cases, *see, e.g., Martin* v. *Mabus, supra*; *Jordan* v. *Allain*, 619 F. Supp. 98 (N.D. Miss. 1985); *Connor* v. *Winter*, 519 F. Supp. 1337 (S.D. Miss. 1981), and represent a significant part of the Committee's budget.

When expert fees are denied, the result can effectively nullify any attorney's fee award. *Major* v. *Treen*, 700 F. Supp. 1422 (E.D. La. 1988), a voting rights case in which plaintiffs successfully obtained declaratory and injunctive relief, but in which no damages were sought, is a good illustration. The court there granted prevailing plaintiffs $23,428.17 in attorneys' fees (including $7,308.97 for reimbursement of costs) for the main litigation for the services of Steven Scheckman, a lawyer practicing in a two-person firm, but denied a request for $23,675 in expert fees he incurred, holding that expert fees were not compensable in such cases. Hence, notwithstanding Section 1988's guarantee of a "fully compensatory fee," this successful lawyer suffered a net *loss* of $7,555.80.

Amici are deeply concerned that, unless expert fees are recoverable under Section 1988, the objectives of that Section and perhaps other similar civil rights fee-shifting statutes will be frustrated and the ability of *amici* to represent and induce others to represent plaintiffs with meritorious civil rights claims will be severely impaired.

SUMMARY OF ARGUMENT

This Court recently made clear that a "reasonable attorney's fee" under Section 1988 is not limited to fees for work personally performed by an attorney, but refers "to a reasonable fee for the work product of an attorney." *Missouri* v. *Jenkins*, 109 S. Ct. 2463, 2470 (1989). The costs of experts — who play a vital role in assisting lawyers effectively to prepare and present claims in civil rights litigation — are surely as much an integral part of the attorney's work product as the costs of paralegals, secretaries, messengers, librarians, janitors and other expenditures which the Court in *Jenkins* viewed as indisputably recoverable as part of an "attorney's fee."

This Court has emphasized that, in enacting Section 1988, Congress intended to guarantee a "fully compensatory fee" because only such a fee would provide the necessary incentive to prosecute claims that vindicate the public interest in the enforcement of civil rights. The fees of experts are expenses often borne by attorneys handling civil

rights cases on behalf of needy clients. Unless the very substantial costs of experts may be recovered as part of a Section 1988 fee application, attorneys will not be able to collect a fully compensatory fee and may either provide ineffective representation by dispensing with experts essential to adequate preparation or presentation or decline altogether to undertake civil rights litigation on behalf of the poor and dispossessed.

Section 1988 was specifically intended to overcome the detrimental effects which the Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), might have had on civil rights litigation. The legislative history shows that, in enacting the fee provision, Congress intended to restore the vitality of pre-*Alyeska* cases, in many of which successful civil rights litigants sought and obtained reimbursement for expert fees. The legislative history also shows that, in enacting Section 1988, Congress deliberately copied the language of other civil rights fee-shifting provisions in order to embrace the judicial interpretation of those provisions. Many of the lower court cases construing those provisions specifically read "attorney's fee" to encompass expenditures for experts. The decision below, which held that expert fees are not recoverable under Section 1988, is an unreasonable limitation of that Section and sharply at odds with the intent of Congress.

The court below wrongly concluded that the question presented here was controlled by *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987). That case, which delineated the scope of costs recoverable under Rule 54(d) of the Federal Rules of Civil Procedure, has no bearing on the question of whether the provision for an attorney's fee in Section 1988 permits the recovery of expert fees.

ARGUMENT

I

ONLY THE ALLOWANCE OF EXPERT FEES WILL GUARANTEE THE FULLY COMPENSATORY FEE REQUIRED BY SECTION 1988

Congress enacted the fee provision of Section 1988 to insure that prevailing civil rights plaintiffs would receive a "fully compensatory fee." *Missouri* v. *Jenkins*, 109 S. Ct. 2463, 2470 (1989); *Hensley* v. *Eckerhart*, 461 U.S. 424, 435 (1983). 2/ This fee must compensate not only for the time charges of the attorney, but also for all elements comprising "the work product of an attorney" used to vindicate the injury to civil rights, including the efforts of all persons "whose labor contributes to the work product for which an attorney bills her client." *Missouri* v. *Jenkins*, 109 S. Ct. at 2470. For example, in acknowledging that paralegal costs are within the scope of Section 1988, this Court held that a "reasonable attorney's fee" must take account of "secretaries, messengers, librarians, janitors, and others . . . ; and it must also take account of other expenses and profit." *Id.* 3/

The work of experts contributes as significantly to the work product of lawyers in civil rights litigation as the activities enumerated by the Court in *Jenkins*. *See Friedrich* v. *City of Chicago*, 888 F.2d 511, 514–15 (7th Cir. 1989) (analogizing from *Jenkins* and concluding that expert fees are recoverable), *petition for cert. filed*, 58 U.S.L.W. 3505 (U.S. Jan. 29, 1990) (No. 89–1230). Moreover, regardless of the billing

2/ 42 U.S.C § 1988 provides in pertinent part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

3/ The same point was made by a sponsor of the bill that became the fee provision of Section 1988: "[T]he phrase 'attorney's fee' would include the values of the legal services provided by counsel, *including all incidental and necessary expenses incurred in furnishing effective and competent representation*." 122 Cong. Rec. H12,160 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan) (emphasis added).

mechanics, the cost of the expert is as much an expense of hiring a lawyer as the cost of paralegals in the lawyer's employ.

It is the lawyer who decides that an expert is needed for the proper presentation of the case and who usually selects the expert. Thereafter, the lawyer employs the expert to advise her, to interpret data and to help the lawyer devise trial strategy. The lawyer and the expert also work together to prepare any testimony the expert gives at trial. 4/ As Judge Posner said, in affirming a decision that expert fees are recoverable under Section 1988:

> Experts are not only hired to testify; sometimes they are hired, also or instead, to educate counsel in a technical matter germane to the suit. The time so spent by the expert is a substitute for lawyer time, just as paralegal time is, for if prohibited (or deterred by the cost) from hiring an expert the lawyer would attempt to educate himself about the expert's area of expertise. To forbid the shifting of the expert's fee would encourage underspecialization and inefficient trial preparation, just as to forbid shifting the cost of paralegals would encourage lawyers to do paralegals' work.

Friedrich, 888 F.2d at 514. There is no need to look further than the opinions of this Court over more than three decades for confirmation of the importance attached to expert testimony in civil rights cases. 5/ In fact, the ultimate effect of many opinions of this Court is to require

4/ *See generally Using Experts in Civil Cases* (M. Kraft 2d ed. 1982); *see also Ake* v. *Oklahoma*, 470 U.S. 68, 80–82 (1985) (recognizing importance of multiple roles played by psychiatrist in criminal insanity proceedings). This Court has recognized the important role played by investigators in forming the "work product" of the attorney. *United States* v. *Nobles*, 422 U.S. 225, 237–39 (1975) (investigator's reports protected from discovery under the work product doctrine). Experts clearly play an even more substantial role than investigators.

5/ *See, e.g., Thornburg* v. *Gingles*, 478 U.S. 30, 52 (1986) ("The investigation conducted by the District Court into the question of racial bloc voting . . . relied principally

(Continued)

expert testimony in order for civil rights litigants to prevail in certain types of cases. [6/]

Unless expert fees are included within the fees recoverable under Section 1988, fee awards will not be "fully compensatory" because any award for an attorney's fee will be offset, in whole or in part, by expenditures for experts. For example, as noted above, in *Major* v. *Treen*, 700 F. Supp. 1422 (E.D. La. 1988), the costs of experts exceeded by $7,555.80 the net $16,119.20 attorney's fee recovered for the work of plaintiff lawyer Scheckman. Similarly, in *Cobbs* v. *Grenada County*, No. WC84-136-S-O (N.D. Miss. Sept. 13, 1989), the court granted prevailing civil rights plaintiffs $12,000 in attorneys' fees but denied a request for $7,500 in expert fees incurred, holding that expert fees are not compensable. The offset is likely to be substantial, because the fees reasonably charged by experts in civil rights cases reflect the value of their specialized knowledge and skills. *See, e.g., Ramos* v. *Lamm*, 713 F.2d 546, 559 (10th Cir. 1983) (affirming award of $20,219.70 in expert fees in prison conditions case); *Thornberry* v. *Delta Air Lines, Inc.*, 676 F.2d 1240, 1245 (9th Cir. 1982) ($83,918 in expenses primarily for "expert computer witnesses" found "essential" to proof of Title VII

(Continued)
on statistical evidence presented by [plaintiffs'] expert witnesses . . . ."); *Tennessee* v. *Garner*, 471 U.S. 1, 10-11 & n.10 (1985) (finding civil rights violation by relying on, among other things, affidavit of expert on police procedure); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (employment discrimination may be proven using statistical methods demonstrating disparate impact); *Brown* v. *Board of Educ.*, 347 U.S. 483, 494 & n.11 (1954) (relying on psychological and sociological evidence of impact of "separate but equal" facilities).

6/ *See, e.g., Carey* v. *Piphus*, 435 U.S. 247, 263-64 (1978) (mental and emotional distress arising out of due process violation not compensable absent objective proof of actual injury); *Craig* v. *Boren*, 429 U.S. 190 (1976) (statistical studies may show sex discrimination); *Estelle* v. *Gamble*, 429 U.S. 97 (1976) (prisoner may prove Eighth Amendment violation with evidence of deliberate indifference to medical needs); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) (testing specialists may show employment tests to be improperly discriminatory); *Griggs*, *supra*; *cf. O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) (claim for failure of mental health institution to release patient, such as Donaldson, might be proven with expert testimony).

case), *vacated on other grounds*, 461 U.S. 952 (1983); *Martin* v. *Mabus*, Nos. J84-0708(B) and J85-0960(B) (S.D. Miss. Feb. 27, 1990) (denying $78,395.57 in expert fees in voting rights case as non-recoverable; expert fees not paid equaled 18% of recovered attorneys' fees).

Moreover, Congress was particularly concerned about needy civil rights plaintiffs who lack the resources to pay for the costs of legal representation. [7/] At the same time, some of the most significant civil rights cases seek only equitable or declaratory relief, leaving no monetary award from which expert fees can be reimbursed. [8/] Hence, unless Section 1988 permits recovery of expert fees, the civil rights lawyer often is faced with a Hobson's choice: Forego use of the expert (which may require the lawyer to abandon the entire case), or bear the cost herself. This choice is especially difficult because the typical civil rights practitioner is, contrary to popular misconceptions, a small, local firm that, like public-interest, nonprofit organizations such as *amici*, does not have extensive resources to devote to paying experts. *See* Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorneys Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719, 768-69 (1988). Money expended on experts, of course, is unavailable to support other civil rights litigation that civil rights lawyers would otherwise undertake.

Civil rights lawyers have emphasized the burdens imposed by expert fees as part of the more general economic obstacles to effective legal representation in civil rights cases. At Senate hearings held in 1973 to consider the effects of legal fees on citizen access to lawyers and the courts, one lawyer testified:

7/ S. Rep. No. 1011, 94th Cong., 2d Sess. ["Senate Report"] 2 ("In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer."), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5910; H.R. Rep. No. 1558, 94th Cong., 2d Sess. ["House Report"] 1 (1976) ("a vast majority of the victims of civil rights violations cannot afford legal counsel").

8/ *See, e.g., Thornburg v. Gingles, supra; Brown v. Board of Educ., supra; cf. Blanchard* v. *Bergeron*, 109 S. Ct. 939, 945 (1989) (refusing to limit § 1988 attorney's fee based on damages proven at trial).

> Now, when a public interest law firm is involved, or when a group of citizens or even an individual citizen decides to take on a big case and to present the views of the other side in a big case . . . there is simply no money up front. . . . [T]here is very little money for such essential things as, for example, expert witnesses. And so what I found . . . was that I did not have any money at all to pay any expert anything. . . .
>
> . . .
>
> As a result, the public interest lawyer must pare off very important issues — that might even be winning issues — simply because they are either too technical or too big, or require too much expenditure of money.

The Effect of Legal Fees on the Adequacy of Representation: Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. 832–34 (1973) (statement of Dennis Flannery); *see also id.* at 799, 812, 816 (statements of other witnesses); *id.* at 1108, 1127, 1128 (statement of Senator Tunney, who sponsored a bill which became § 1988). [9/]

In short, the refusal to award expert fees will deny lawyers a "fully compensatory fee," thereby diminishing the incentive provided by Section 1988. As this Court observed, without a fully compensatory fee, "the prospect of . . . hardship [induced by the failure to compensate] could well deter otherwise willing attorneys from accepting complex civil rights cases that might offer great benefit to society at large; this result would work to defeat Congress' purpose in enacting § 1988 of 'encourag(ing) the enforcement of federal law through lawsuits filed by private persons.'" *Missouri* v. *Jenkins*, 109 S. Ct. at 2469 n.6 (quoting

9/ A representative of the Lawyers' Committee testified similarly before the House of Representatives. *Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 89, 100 (1975) (some cases "cannot be brought" because, *inter alia*, private attorneys for plaintiffs cannot "afford the technical assistance of expert witnesses"); *see also* House Report at 2–3 (same).

Pennsylvania v. *Delaware Valley Citizens' Council*, 483 U.S. 711, 737 (1987) (Blackmun, J., dissenting)). [10/]

Even in cases in which there is a monetary recovery from which the lawyer could obtain reimbursement for expert fees she advanced, civil rights plaintiffs would be left with a reduced recovery, thereby diminishing their incentive to initiate civil rights litigation.

The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 (codified at 42 U.S.C. § 1988) reveals that Congress was as concerned about the need to insure that potential plaintiffs have the incentive to bring meritorious civil rights claims as it was about the need to insure that lawyers would prosecute them:

> The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. *Unless the judicial remedy is full and complete, it will remain a meaningless right*. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, H.R. 15460 is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. ["House Report"] 1 (1976) (emphasis added). [11/]

10/ *See also Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances.") (quoting House Report at 1); *Blanchard* v. *Bergeron*, 109 S. Ct. 939, 945 (1989) (same).

11/ *See also* Senate Report at 2 ("If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then *citizens must have the opportunity to recover what it costs them* to vindicate these rights in court.") (emphasis added).

This Court has made the same point about the purpose of the identically-worded fee provision of Title VII of the Civil Rights Act of 1964:

> the central purpose of § 706(k) is to vindicate the national policy against wrongful discrimination by encouraging victims to make the wrongdoers pay at law — assuring that the incentive to such suits will not be reduced by the prospect of attorney's fees that consume the recovery.

Independent Federation of Flight Attendants v. *Zipes*, 109 S. Ct. 2732, 2736 (1989) (citing *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968)). In sum, the cost of experts is a necessary and important part of the cost of effective legal representation in civil rights litigation and falls directly within the concerns which Congress sought to address when it enacted the attorney's fee provision of Section 1988. Section 1988, therefore, should be read to include compensation for expert fees in order to assure a "fully compensatory fee" and maintain the incentive to prosecute meritorious civil rights claims.

II

CONGRESS ENACTED THE FEE PROVISION OF SECTION 1988 IN ORDER TO OVERTURN *ALYESKA* AND INCORPORATE EXISTING CASE LAW UNDER WHICH EXPERT FEES HAD BEEN GRANTED

The historical background to Section 1988 is also persuasive evidence that Congress used the phrase "attorney's fee" as a shorthand for all expenditures, including expert fees, needed for effective legal representation in civil rights cases. As this Court has said, a reliable "guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body." *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 463 (1892).

Prior to this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), numerous courts in cases

brought under civil rights statutes without express fee-shifting provisions granted compensation for the charges of experts, along with expenditures for legal representation, as part of costs. These courts recognized that such compensation achieved equity in civil rights cases and gave an appropriate incentive to "private attorneys general" to vindicate their statutory and constitutional rights. [12/] *Alyeska* held that an attorney's fee was not recoverable in civil rights cases because courts did not have this equitable discretion and, except as provided in statutes enumerating recoverable costs, could not award any of the expenses of litigation in civil rights cases. In passing the Civil Rights Attorney's Fees Awards Act of 1976 (codified at 42 U.S.C. § 1988), Congress specifically undertook to overrule *Alyeska* and restore the incentives guaranteed by prior case law. *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983); 122 Cong. Rec. S16,252 (daily ed. Sept. 21, 1976); *id.* at H12,154, H12,155 (Oct. 1, 1976). Accordingly, courts applying Section 1988 should have the same power to award expert fees that they had prior to *Alyeska*.

Further, Congress made clear its intention that the fee provision of Section 1988 be construed in the same way as the identical language

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12/ *See, e.g., Fairley* v. *Patterson*, 493 F.2d 598, 606 n.11 (5th Cir. 1974); *Welsch* v. *Likins*, 68 F.R.D. 589, 596-97 (D. Minn.), *aff'd*, 525 F.2d 987 (8th Cir. 1975); *Wallace* v. *House*, 377 F. Supp. 1192, 1206-07 (W.D. La. 1974), *vacated in relevant part for reconsideration in light of Alyeska*, 515 F.2d 619, 638 (5th Cir. 1975), *vacated*, 425 U.S. 947 (1976); *Sabala* v. *Western Gillette, Inc.*, 371 F. Supp. 385, 394 (S.D. Tex. 1974), *remanded in relevant part for reconsideration in light of Alyeska*, 516 F.2d 1251, 1267-69 (5th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977); *Sims* v. *Amos*, 340 F. Supp. 691, 695 & n.11 (N.D. Ala.), *aff'd*, 409 U.S. 942 (1972); *Jones* v. *Wittenberg*, 330 F. Supp. 707, 722 (N.D. Ohio 1971), *aff'd*, 456 F.2d 854 (6th Cir. 1972); *Bradley* v. *School Bd.*, 53 F.R.D. 28, 44 (E.D. Va. 1971), *rev'd*, 472 F.2d 318 (4th Cir. 1972), *vacated*, 416 U.S. 696 (1974); *Wright* v. *McMann*, Nos. 66-CV-77, 67-CV-174 (N.D.N.Y. Aug. 19, 1970), *noted in Wallace*, 377 F. Supp. at 1207, *aff'd in part, rev'd in part on other grounds*, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972); *see also Copeland* v. *School Bd.*, 464 F.2d 932, 934 (4th Cir. 1972) (decision to award expert witness fees within discretion of trial court); *cf. Wolf* v. *Frank*, 477 F.2d 467, 480 (5th Cir.) (expert fees awardable since private litigation furthers goals of securities laws), *cert. denied*, 414 U.S. 975 (1973); *Bebchick* v. *Public Utils. Comm'n*, 318 F.2d 187, 204 (D.C. Cir.) (same result in public transport case), *cert. denied*, 373 U.S. 913 (1963); *La Raza Unida* v. *Volpe*, 57 F.R.D. 94, 102 (N.D. Cal. 1972) (same result in highways case).

of the fee provisions of other civil rights statutes had been construed by the federal courts.

> S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k), and section 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. § 1973*l*(e). . . . It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act.

S. Rep. No. 1011, 94th Cong., 2d Sess. 2, 4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5910, 5912; *see also Hanrahan* v. *Hampton*, 446 U.S. 754, 758 n.4 (1980); House Report at 5, 6 ("Because other statutes follow [the approach of § 1988], the courts are familiar with [the terms used] and in fact have reviewed, examined, and interpreted them at some length."). [13/]

Congress explicitly incorporated and endorsed the prior case law construing these other fee provisions so as to give the phrase "reasonable attorney's fee" meaning without need to resort to item-by-item delineation of reimbursable expenditures. The prior decisions interpreting these statutes, [14/] including two cases specifically cited in the Senate Report, [15/] allow recovery of expert fees. This Court has previously considered these two cases as authoritative sources on the construction of Section 1988. *See, e.g., Blum* v. *Stenson*, 465 U.S. 886, 893-94 (1984); *Hensley* v. *Eckerchart*, 461 U.S. at 431.

It is thus plain that Congress specifically intended Section 1988 to restore the equitable principles of pre-*Alyeska* decisions — many of which applied these principles to award expert fees. The language chosen by Congress also was designed to encompass lower court decisions interpreting identically-worded provisions of other fee-shifting civil rights statutes, including decisions that awarded recovery of expert fees in order to maintain the incentive needed to encourage effective enforcement of civil rights.

III

CRAWFORD FITTING IS INAPPLICABLE TO THIS CASE

The court below felt constrained to deny petitioner expert fees in excess of $30 per day because of this Court's opinion in *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987). The decision below, we submit, was based on a fundamental misreading both of the reach of the *Crawford Fitting* opinion and of the policies that give force to Section 1988.

The only question addressed in *Crawford Fitting* was whether Rule 54(d) of the Federal Rules of Civil Procedure afforded federal courts discretion to award as costs expert witness fees in excess of the witness fees specifically enumerated in 28 U.S.C. §§ 1821 and 1920. 482 U.S. at 439, 441-42. The parties in that case relied entirely on Rule 54(d) and did not seek recovery under any other provision of law. [16/]

13/ Because Congress adopted existing statutes and accepted those statutes' judicial glosses in crafting Section 1988, it is not appropriate to resort solely or primarily to a textual analysis of Section 1988 when seeking its meaning. *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-98 (1979); *cf. Hughes* v. *Rowe*, 449 U.S. 5 (1980) (adopting differing recovery standards for plaintiffs and defendants under § 1988, despite language which grants fees to "prevailing party").

Similarly, the fact that some later fee-shifting statutes and some fee-shifting statutes in unrelated areas of the law make specific reference to expert witness fees has no bearing on the proper interpretation of Section 1988. *See Friedrich* v. *City of Chicago*, 888 F.2d 511, 517 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3505 (U.S. Jan. 29, 1990) (No. 89-1230).

14/ *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 400 F. Supp. 993, 997 (S.D.N.Y. 1975) (Title VII), *aff'd*, 542 F.2d 579 (2d Cir. 1976); *Davis* v. *County of Los Angeles*, 8 E.P.D. (CCH) ¶ 9444 (C.D. Cal. 1974) (same); *see also Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975) (expert fees recovered pursuant to identically-worded 20 U.S.C. § 1617).

15/ Senate Report at 6 (citing with approval *Davis* and *Swann*).

16/ *Crawford Fitting* was an antitrust case; its companion case was brought pursuant to Title VII and 42 U.S.C. § 1981. Although both sets of statutes have provisions relating to the shifting of litigation expenses, the cases as presented to the Court concerned only Rule 54(d). *See* 482 U.S. at 439; *id.* at 446 n.1 (Marshall, J., dissenting).

The Court's opinion, therefore, never construes any other statute and, in particular, never addresses the question presented here: Whether expert fees are recoverable under Section 1988, a statute passed specifically to overcome the limitations of Rule 54(d). *See id.* at 445 (Blackmun, J., concurring); *id.* at 446 n.1 (Marshall, J., dissenting).

The opinion of the Court in *Crawford Fitting* does assert: "We hold that absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." 482 U.S. at 445. The court below apparently read this Court's reference to "explicit" authorization to mean that expert fees are not recoverable under Section 1988 unless that statute "expressly" refers to expert fees. 885 F.2d at 34. But references to "explicit" and "expressly" merely beg the question, which is whether the phrase "attorney's fee" as used in the context of Section 1988 includes expenditures for experts. The common sense reading of "attorney's fee" mandated by this Court in *Jenkins* and the noble and generous spirit encapsulated by Section 1988 compel the conclusion that expert fees — costs so frequently ... e by, and invariably incurred in aid of, civil rights lawyers — are included within the "attorney's fee" recoverable under that Section.

Finally, the Court's statement of its holding in *Crawford Fitting* is directed solely to "the expenses of a litigant's *witness*." 482 U.S. at 445 (emphasis added). Even if Section 1988 were not read to override any limitation imposed by Sections 1821 and 1920, *Crawford Fitting* has no bearing on the many out-of-court services performed by experts for which much of the compensation under Section 1988 is sought. *See Friedrich*, 888 F.2d at 515; *see also Denny* v. *Westfield State College*, 880 F.2d 1465, 1474 (1st Cir. 1989) (Breyer, J., concurring).

CONCLUSION

The cost of experts is a substantial and often necessary part of the costs of an attorney's work product in civil rights litigation. A refusal to award such fees to a successful litigant is inconsistent with the "fully compensatory fee" guaranteed by Section 1988 and the purpose of that Section to encourage vigorous enforcement of civil rights.

For the reasons set forth above, the order of the court of appeals concerning expert fees should be reversed.

Respectfully submitted,

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